

The scenario has of course changed with the passing of the Amendment Act A766 especially the omnibus validation by s 5 of that Act.

Section 5 of the amending Act certainly has legislative effect. The appeal on the preliminary point was accordingly dismissed.

Appeals dismissed.

Solicitors: *Karpal Singh & Co; Shanmugam & Co.*

Reported by *Prof Ahmad Ibrahim*

Malayan United Finance Bhd v Tay Lay Soon

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-197-90
ABDUL HAMID OMAR LP, AJAIB SINGH AND JEMURI
SERJAN SCJJ
29 JANUARY 1991

Land Law — Charge — Indefeasibility of and priority over caveats — Land charged to appellants — Appellants commencing foreclosure proceedings — Sale of land made by registered proprietor to respondent — Respondent lodged caveats — Application by appellant to remove caveats — Whether purchaser has any right to redeem charge — Applicability of equity of redemption — National Land Code 1965, ss 244, 249(1), 266(1), 326, 327 & 340

In this case the registered proprietor of certain lands in Penang had charged them to the appellant to secure the repayment of the loan of \$1,500,000 and interest. The registered proprietor having defaulted in the repayment of the said loan, the appellant took the preliminary steps with a view to commencing foreclosure proceedings to enforce the charge. It was found that two private caveats had been lodged against the land by the respondent after the registration of the charge. The caveats were based on a purported agreement by the registered proprietor to sell the lands to the respondent. There was a dispute between them and the respondent had brought an action for specific performance of the agreement. The appellants applied to have the caveats removed under s 327 of the National Land Code 1965. It was argued for the appellants that the charge on registration was indefeasible and ranked in priority over the caveats. The learned trial judge basing himself on the principles enunciated in *Eng Ah Mooi & Ors v Oversea Chinese Banking Corp Ltd*³ held that the caveator had succeeded in showing a triable issue as between himself and the chargee and he dismissed the application. The appellants appealed.

Held, allowing the appeal:

(1) In this case the chargee had an indefeasible right by virtue of the registration of the charge and this right had priority over the caveats which were lodged five years after the registration of the charge.

(2) The respondent's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the National Land Code must be rejected. It is the chargor or the borrower who has the right to discharge the charge and the right to tender payment before the judicial sale is specifically and exclusively granted to the

A chargor. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in the situation under the National Land Code is clearly technically and legally incorrect.

[Bahasa Malaysia summary]

B Di dalam kes ini tuanpunya berdaftar tanah di Pulau Pinang telah mencagarkan tanah itu kepada perayu untuk menjamin pembayaran hutang sejumlah \$1,500,000 dan bunga. Tuanpunya itu telah gagal membayar hutang itu dan perayu telah mulai mengambil tindakan untuk membawa prosiding foreclosure bagi menguatkuasakan cagaran itu. Telah terdapat dua kaveat persendirian yang telah di serah-simpan oleh responden selepas pendaftaran cagaran itu. Kaveat-kaveat itu berdasar kepada apa yang dikata perjanjian oleh tuan punya tanah itu untuk menjual tanah itu kepada responden. Perkara itu telah dipertikaikan dan responden telah mengambil tindakan untuk mendapat pelaksanaan tepat perjanjian itu. Perayu telah memohon supaya kaveat-kaveat itu dihapuskan dibawah s 327 Kanun Tanah Negara 1965. Telah dihujahkan bagi pihak perayu bahawa cagaran itu apabila didaftar tidak boleh disangkal dan harus diberi keutamaan keatas kaveat-kaveat itu. Hakim yang arif telah bersandar kepada prinsip-prinsip yang disebut di dalam kes *Eng Ah Mooi & Lain-Lain lwn Oversea Chinese Banking Corp Ltd*³ dan telah memutuskan bahawa pengkaveat telah berjaya mengemukakan isu yang perlu dibicarakan antaranya dan pemegang cagaran dan ia menolak permohonan perayu. Perayu telah membuat rayuan.

E **Diputuskan**, membenarkan rayuan itu:

(1) Di dalam kes ini pemegang cagaran itu mempunyai hak yang tidak boleh disangkal oleh kerana cagaran itu telah didaftar dan hak ini diberi keutamaan keatas kaveat-kaveat yang telah diserahkan lima tahun selepas pendaftaran cagaran itu.

F (2) Hujah responden bahawa ia mempunyai hak disisi statut atau ekuiti untuk pelepasan atau penebusan suatu cagaran di bawah peruntukan Kanun Tanah Negara tidak boleh diterima dan harus ditolak. Yang mempunyai hak menebus cagaran itu ialah penggadai atau peminjam dan hak menawarkan pembayaran sebelum penjualan mengikut perintah mahkamah diberi cara khusus dan istimewa kepada penggadai. Oleh kerana hak tanah yang dicagarkan masih berada dalam tangan tuanpunya berdaftar, ia tidak ada apa-apa yang boleh ditebuskan. Menggunakan perkataan ekuiti penebusan (equity of redemption) dan sebagainya di dalam keadaan di Malaysia di bawah Kanun Tanah Negara adalah jelas tidak betul dari segi teknik dan undang-undang.]

Cases referred to

- 1 *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (refd)
- 2 *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (refd)
- 3 *Eng Ah Mooi & Ors v Oversea Chinese Banking Corp* [1983] 1 MLJ 209 (not folld)
- 4 *Pearce v Morris* (1869) 5 LR Ch App 227 (refd)
- 5 *Tarn v Turner* (1888) 57 LJ Ch 452 (refd)
- 6 *Abigail v Lapin* [1934] AC 491 (refd)
- I 7 *Haji Abdul Rahman v Mahomed Hassan* [1917] AC 209 (folld)

Legislation referred to

National Land Code 1965 ss 249(1), 255, 266(1), 326, 327, 340

Appeal from: Originating Motion No 25-66-89 (High Court, Penang)

YM Siew for the appellant.
RR Sethu for the respondent.

Cur Adv Vult

Jemuri Serjan SCJ (delivering the judgment of the court): This is an appeal against the decision of the High Court in Penang which was handed down on 27 March 1990, dismissing an application by Malayan United Finance Bhd, now known as MUI Finance Bhd, the appellant, for the removal of two private caveats under s 327 of the National Land Code 1965.

The following facts in so far as they are relevant to this appeal are elicited from the affidavits of the attorney of the appellant and the respondent, Tan Lay Soon. Kam Mah Theatre Sdn Bhd, the registered proprietor of the two parcels of land held under Perakuan Pendahuluan Mengenai Hakmilik Pegangan No 1095 mukim 12 daerah Barat Daya, Pulau Pinang, and Grant No GM 79 and GM 80, Pegangan No 1610 and 1611, mukim 12 daerah Barat Daya, Pulau Pinang, in consideration of a loan in the sum of \$1,500,000 advanced to it by the appellant executed on 13 June 1984 a charge in securing the repayment of the loan together with interest. The registered proprietor having defaulted in the repayment of the said loan in accordance with the provisions of the charge, the appellant took the usual preliminary steps with a view to commencing foreclosure proceedings to enforce the charge. In doing so its attention was drawn to two private caveats both lodged by Tan Lay Soon, the respondent, on 12 April 1989, well nigh five years after the registration of the said charge.

The caveatable interest lodged by the respondent in the case of both caveats arose out of a purported agreement contained in the registered proprietor's letter dated 10 March 1989 where it had agreed to sell to the respondent the said parcels of land for a total sum of \$1,861,884. It was said that the respondent entered into the alleged agreement as trustee for the Grand Central Enterprise Sdn Bhd. On the same day the respondent wrote to the solicitors for the registered proprietor, forwarding a cheque in the sum of \$90,394.20, being the deposit referred to in the alleged agreement and at the same time, forwarding a draft of the formal sale and purchase agreement. Not having heard from the solicitors for the registered proprietor, the respondent sent a reminder that according to the alleged agreement the sale and purchase agreement had to be approved and executed on or before 18 March 1984. However, on 23 March 1984, five days after the date of the execution of the formal sale and purchase agreement, the solicitors for the registered proprietor wrote a letter to the respondent, stating in effect that the

A deal was off because the conditions of the proposed agreement were not acceptable and returning the deposit of \$90,394.20. As a result the respondent filed Civil Suit No 22-226-89 against the registered proprietor for specific performance and damages. The suit is still pending.

B In the meantime the appellant gave notice to the respondent and demanded from him the removal of the caveats as clearly the respondent had chosen to ignore the appellant's interest by virtue of the charge and proceeded to enter into the purported agreement to purchase the said property subject to the charge. The respondent having refused to remove the caveats, the appellant, as an aggrieved body by the existence of the caveats, therefore applied to the High Court under s 327 of the National Land Code 1965 for the removal of the caveats, citing as reasons therefor, that it was the registered chargee, presently exercising its right of sale of the charged property under s 256 of the National Land Code 1965 and that its interest under the charge were indefeasible and ranked in priority over and above those of the respondent.

D In his affidavit in opposition to the application the respondent asserted that he had caveatable interests in the said property by virtue of the fact that there was a sale agreement between him and the registered proprietor of the land whereby the latter agreed to sell the said land to him at \$9 per sq ft. He had already paid an initial sum of \$90,394.20 in accordance with the terms and conditions agreed upon but later this sum of money was refunded when the registered proprietor repudiated the contract. In consequence of the repudiation of the contract he had filed a civil suit which is pending for specific performance and damages. He averred that as a purchaser he was entitled to redeem the said land to protect his interests which right the appellant could not deny him. To pursue this so-called right he had in fact through his solicitors enquired from the appellant the amount outstanding and payable by the registered proprietor but the appellant had refused to disclose the amount due.

F It transpired that the registered proprietor also applied under s 326(1) of the National Land Code 1965 for the removal of the two caveats and the two applications were simultaneously heard. Both applications were dismissed. It is explicit from the judgment that the registered proprietor's application was dismissed on the ground that the respondent as caveator had satisfied the court that both in fact and in law there were serious issues to be tried in relation to the contract of sale of the charged land and that on the balance of convenience it would be better to maintain status quo until the trial of the action instituted by the respondent for specific performance, applying the principles in *Eng Mee Yong & Ors v V Letchumanan*.¹

As regards the application of the appellant for the removal of the caveats under s 327 of the Code the appellant's case was argued principally on the basis that the charge was indefeasible under s 340(1) of the Code and ranked in priority over the caveats, they having been registered almost five years earlier than the caveats. It seems clear beyond doubt whether the appellant was an aggrieved person or not was not an issue in the High Court and we assume, without deciding on it, it was regarded as such. Strange as it may seem to us, the learned judge declared he was impressed with the submission on priority of the charge but instead of allowing the application on that basis in view of the dictum of Gill CJ (Malaya) at p 55, F-H (left col) in *Macon Engineers Sdn Bhd v Goh Hooi Yin*,² he proceeded to consider the application on the basis of the principles enunciated by Salleh Abas FJ (as he then was) in *Eng Ah Mooi & Ors v Oversea Chinese Banking Corp Ltd*,³ thereby completely eschewing the consideration of the question of priority of the charge over the caveats. He expressed the view that the appellant's argument on priority of the charge was an over-simplification of the issue. This is in spite of the fact that the respondent conceded the priority of the charge but quite obviously the learned judge felt bound to follow *Eng Ah Mooi's* case³ without even discussing the principles in the case. After quoting Salleh Abas's proposition of law on the right of equity of redemption of a charge the learned judge concluded thus (at p 26 of the appeal record):

Accordingly I felt bound to hold that the caveator had also succeeded in showing a triable issue as between himself and the chargee.

What appears to have preoccupied or troubled the mind of the learned judge which made him feel constrained to make that remark as well as those in the last two paragraphs of his judgment and dismiss the appellant's application is the decisions in *Eng Mee Yong*¹ and *Macon Engineers*² which decided that in an application for the removal of a caveat the caveator must satisfy the court both in fact and in law that his claim is not frivolous or vexatious and that on the balance of convenience it would be better to maintain status quo until the disposal of the action. With all respect, to apply such considerations in the context of the appellant's case obscures the real and crucial issue before the High Court. The cursory disposal of the issue by merely citing the authority of *Eng Ah Mooi*³ does not in our view resolve the issue but rather postpone it. It may be necessary to recapitulate that as between the appellant and the respondent both in the High Court and before us the pivotal issue is the indefeasibility and priority of the charge over the caveats on the part of the appellant and the right of the respondent, in the respondent's own words, to redeem the charge on the part of the respondent.

A Learned counsel for the respondent adopted the same arguments which he advanced in the court below and maintained in effect that the right of the respondent to discharge the charge transcended the priority of the charge which arguments indubitably appealed to the learned judge. This issue was not satisfactorily dealt with by the learned judge. Under the circumstances it behoves us to examine *Eng Ah Mooi's* case³ in some detail particularly on the so-called equitable right to discharge a charge.

B In that case the appellants sued the respondents, claiming a declaration that they were entitled to the discharge of the charge on payment of the amount due from the registered proprietor by virtue of a sale and purchase agreement they entered into whereby the land was sold at a total price of \$52,000. The respondent disputed the validity of the sale agreement as being vitiated by fraud. The High Court dismissed the suit but on appeal, the Federal Court held that the agreement was valid and that the appellants were entitled to the declaration. On the right of the appellants to discharge the charge, Salleh Abas FJ at p 210 said:

C Just as a mortgage is not irredeemable, likewise a charge is not undischargable. Under English law a mortgagee (sic) or any person interested in the mortgaged property has the right to demand the mortgagee to redeem the mortgage on tendering the amount of debt together with interest thereon due on the mortgage. *Pearce v Morris* (1869) 5 LR Ch App 227. We see no reason to hold that this rule of English law is inapplicable to the present appeal. In our view this rule is applicable although a lot has been said elsewhere about the differences between the common law mortgage and a charge under the Torrens System.

E F The legal proposition as laid down in *Eng Ah Mooi's* case,³ unless overruled as having been decided per incuriam, would have the effect of introducing a novel doctrine of equity of redemption into the concept of a statutory charge as security for a loan under Part 16 of the Code, ie the English rule of right of equity of redemption. It is tantamount to legislating by case law which is not the function of the court as we all know. We therefore consider it necessary to examine this English rule which finds favour with the Federal Court in *Eng Ah Mooi's* case³ and the learned judge in the instant case. In *Pearce v Morris*⁴ Lord Hatherley LC, at p 229, spoke of this rule in the following words:

G H Any person interested in the equity of redemption is entitled to redeem, and when, being so entitled, he tenders the mortgage money and interest, he, having a part in the equity of redemption, is entitled to the delivery of the title deeds, and to have a conveyance of the property.

I At p 230 in amplification he added:

A mortgagee, though a trustee when he is paid off by the right person (as in the case of *Cholmondeley v Clinton* (4)), has a plain duty to perform. He is only a trustee for the persons interested in the equity of redemption; and so far

as the authorities have gone hitherto, he is not entitled to convey absolutely to a mere stranger to the estate, but is bound to convey to any person having an interest in the estate which gives a right to redeem. Then the mortgagee has to discharge his duty fully making a conveyance and handing over the deeds to the person tendering him the money.

These observations ostensibly are the basis of Salleh Abas's formulation of his new concept of equity of redemption in *Eng Ah Mooi*'s case.³

This leads us to the question, what is this doctrine of equity of redemption? For the answer, we have to examine what a mortgage and the rule of equity of redemption thereof were in England before and after the passing of the English Law of Property Act 1925. Kekewich J in *Tarn v Turner*⁵ at p 453 explained with lucidity the concept of mortgage and equity of redemption in the following words:

It is familiar to all of us that the law of mortgages, and more particularly, in respect of the redemption of mortgages, is founded in the first instance on the nature of a legal mortgage of freeholds — that is, upon its constitution as a conveyance of the property, with a proviso for its reconveyance in a certain event. Equity has long held that the real contract thereby created is not one of vendor and purchaser, but that it is a security for the repayment of the principal money and interest, and for the right to have the property back again in exchange for the money, if repaid at any time, although the time fixed by the covenant may long be past. The courts have construed *that right to have the property back as an estate in the land comprised in the conveyance; it is just as much an interest or estate as the fee-simple is, and has in legal phraseology become known as the equity of redemption.* (Emphasis added.)

That was the position in respect of legal mortgage prior to the Law of Property Act 1925. Since then, the legal mortgage underwent a slight change in its character and so did the nature of the equity of redemption. Under the present system of creating legal mortgages under that Act the mortgages takes only a term of years leaving the legal freehold reversion expectant on the mortgage term in the mortgagor. Thus the mortgagor retains his legal freehold estate and cannot at the same time have an equitable estate co-extensive with it. Hence, *instead of his equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property*, this right being attached to his legal freehold estate. Nevertheless, despite the change, incident to every mortgage is the right of the mortgagor to redeem: *Halsbury's Laws of England* (4th Ed) at p 190 and p 264. It must be borne in mind that *Pearce v Morris*⁴ is a case decided long before the Law of Property Act 1925 saw the light of day. With due respect quoting *Pearce v Morris* in *Eng Ah Mooi*'s case,³ Salleh Abas FJ was in fact applying the English concept of mortgage as explained by Kekewich J in *Tarn v Turner*⁵ with its incident of 'equity of redemption' into our Code where a

A charge is only a security for a loan without the necessity of the transfer of the estate or interest in the charged land. The equity of redemption and a discharge of a charge are poles apart.

It certainly would avoid confusion if the term equity of redemption should not be used at all in dealing with a charge under the Code because in other jurisdictions, besides England, it conveys an entirely different idea. For instance, in New South Wales, Australia, it was used in a different sense altogether. In *Abigail v Lapin*⁶ at p 500 Lord Wright explained that the Real Property Act 1900, New South Wales, embodied the Torrens system of registration of title to land, not of deeds and of mortgages. He said at p 501:

Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of affecting what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land by the transferee.

It thus can be appreciated that the equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia, where a mortgage is closely analogous to a charge under our National Land Code, but in practice, coupled with a transfer of the legal title as well and where the equity of redemption is not a right but has grown out of practice. 'Equity of redemption' is a misnomer but persistence in its use is not a matter of law but of habit in Australia and in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia, at least in New South Wales.

Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s 243). Under s 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge itself. See cl 3(ii) of the annexure to the charge and s 249(1) of the National Land Code. However, under s 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the court or the Collector and the amount sufficient to cover all ex-

penses in connection with the judicial sale. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical. In our view the decision in *Eng Ah Mooi's* case³ was made without the benefit of the Privy Council decision in the case of *Haji Abdul Rahman v Mohamed Hassan*.⁷ The relevant passage of the judgment is at p 216:

It seems to their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase 'equity of redemption' is quite inapplicable in the circumstances. There is no provision in the Regulation for mortgages apart from what is described as a 'charge'; indeed, they are, except as regards those of the past, de facto abolished after the date of the enactment by s 4 already quoted. That provides for charges, which must be made in a statutory form and must appear on the register to be effective. Under such a system the right to the land remains with the registered owner. He has nothing to redeem, his right on paying the debt being to have the charge cleared off the register.

On that account *Eng Ah Mooi's* case,³ must, therefore, be treated as having been decided per incuriam only in respect of this particular issue.

In the view we take of this appeal we are disposed to reject the respondent's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the National Land Code but we would affirm the right of the chargor or the borrower to discharge a charge under the annexure to the charge which is to be read together with s 249(1) of the Code which right ineluctably is not available to the respondent. Besides, under s 266(1) of the Code, the right to tender payment before the judicial sale is specifically and exclusively granted to the chargor. The question of the competing right to discharge the charge on the part of the respondent does not arise at all and it follows, a fortiori, the priority of the charge prevails.

Under the circumstances we would allow this appeal with costs here and below. The appellant is entitled to have the caveats removed and we so order. The deposit is to be refunded to the appellant.

Appeal allowed.

Solicitors: *Soo Thien Ming & Shahrizat; LS Tan & Co.*

Reported by *Prof Ahmad Ibrahim*

A **Revertex Ltd & Anor v Slim Rivertex Sdn Bhd & Ors**

HIGH COURT (KUALA LUMPUR) — CODE D2-22-1872-89
SITI NORMA YAAKOB J
17 NOVEMBER 1989

B *Civil Procedure — Cause of action — Registrar of Companies refusing plaintiffs' request not to register defendants' trade mark — Whether plaintiffs' only remedy is to appeal against registrar's order — Companies Act 1965, ss 11(10) & 22(1)*

C *Tort — Passing-off — Whether defendants' trade name bore such similarity to plaintiffs' trade name that public would be deceived or confused into believing defendants' business was associated with or connected to plaintiffs' business*

D The plaintiffs in their application for an interim injunction pending the determination of a permanent injunction contended that the defendants had chosen a trade name which looked and sounded very similar to their own such that such similarity was bound to deceive or cause confusion to the public into believing that the defendants' business was associated with or connected to their business and that would cause irreparable loss and damage to their goodwill and reputation. The plaintiffs' corporate name, 'Revertex', had been in use since 1930 and the plaintiffs were also the registered proprietor of two trade marks known as 'Revertex' and 'Rivultex' since 1954. The defendants were an incorporated entity which had not yet commenced its business of manufacturing concentrate latex and examination gloves. Their trade name registered was 'Slim Rivertex Sdn Bhd'.

E The plaintiffs had taken the initial steps of writing to the Registrar of Companies to protest against the defendants' intention of registering itself with the word 'Rivertex' on the grounds that (i) the word bore a close resemblance to their trade name 'Revertex'; and (ii) the defendants had contravened s 22(1) of the Companies Act 1965 and the regulations promulgated thereunder by not first obtaining the plaintiffs' consent to do so. The registrar rejected the plaintiffs' request. The defendants' objection to the plaintiffs' present application for an injunction was in turn based on the following grounds:

- F
- G (i) the plaintiffs had adopted the wrong procedure in filing the civil suit since the plaintiffs' request to the registrar to refuse registration of the defendants' trade name was an acknowledgment that the registrar had the power to rectify a wrong done, when that request was rejected the plaintiffs' only remedy was to appeal against the registrar's order. For this they should have proceeded under s 11(10) of the Companies Act 1965;
- H (ii) alternatively, the defendants were justified in their choice of a trade name as it was only a descriptive name for which the plaintiffs could not claim a monopoly and that deceit or confusion would not arise as they did not trade in the same business.

Held, allowing the plaintiffs' application:

I (1) The plaintiffs had not sought to enforce any right before the registrar and to that extent there was no dispute between the plaintiffs and the registrar. The plaintiffs were doing nothing more than to request the registrar to use his good offices to deal with the matter amicably at that level without the necessity of dragging the matter to court.

(2) In any case, the tort of passing-off of a trade name is an actionable wrong at common law and the plaintiffs there-